1980

Banberry Development Corporation, Mckean Construction Company, Midwest Realty and Finance, Inc. , A Utah Corporation v. South Jordan City, A Municipal Corporation : Appellants' Brief

Utah Supreme Court

MICHAEL J. MAZURAN; Attorney for Appellant-Cross Respondent JOHN H. McDONALD; Attorney for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

BANBERRY DEVELOPMENT CORPORATION, McKEAN CONSTRUCTION COMPANY, MID-WEST REALTY AND FINANCE, INC., a Utah Corporation,	)	
Plaintiffs-Respondents,	)	
vs.	)	No. 16872
SOUTH JORDAN CITY, a Municipal Corporation,	)	
Defendant-Appellant,	)	

APPELLANTS' BRIEF

Appeal from Summary Judgment
of the Third Judicial District Court of Salt Lake County,
Dated September 4, 1979,
and from Denial of Motions
of said Third Judicial District Court
The Honorable Dean Conder, Judge

MICHEAL J. MAZURAN of
STRINGHAM, LARSEN, MAZURAN & SABIN
A PROFESSIONAL CORPORATION
200 North Main Street, Suite 200
Salt Lake City, UT 84103

Attorneys for Appellant

JOHN H. MCDONALD
Attorney at Law
320 South 300 East, Suite 1
Salt Lake City, UT 84111

Attorney for Respondent

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Salt Lake City, UT 84103

Attorneys for Appellant

JOHN H. MCDONALD
Attorney at Law
320 South 300 East, Suite 1
Salt Lake City, UT 84111

Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES CITED

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NATURE OF THE CASE

This is an action brought by the Plaintiffs-Respondents under a Complaint consisting of five (5) Causes of Action wherein the Plaintiffs-Respondents allege that the Defendant-Appellant's water connection fee constitutes an unlawful taking of property without due process of law, that the water connection fee amounts charged by the Defendant-Appellant are unreasonable and constitute an unlawful and unconstitutional tax on the Plaintiffs-Respondents, that the park improvement fee charged by the Defendant-Appellant constitutes an unlawful taking of property without due process of law and is in effect an unconstitutional

unlawful tax, that the amount of said park improvement fees are unreasonable and for declaratory relief and injunctive relief.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, the Honorable Dean Conder presiding, granted Plaintiffs-Respondents Motion for Summary Judgment on Plaintiffs-Respondents First Cause of Action on September 4, 1979, and entered a Permanent Injunction restraining and enjoining the Defendant-Appellant City from requiring the payment of the water connection fee for each lot by the Plaintiffs-Respondents as a condition for final plat approval of Plaintiffs-Respondents' subdivision plat or as a condition precedent to commencement of construction of any and all street utility improvements by the Plaintiffs-Respondents in the Defendant-Appellant City. The trial Court found that the time of collection of said water connection fees by the Defendant-Appellant City is contrary to law being in excess of its statutory authority. On January 2, 1980, the trial Court entered its Order denying the Defendant-Appellant's Motion to Alter and/or Amend the judgment previously entered by the trial Court.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks a reversal of the Summary Judgment of the trial Court, that the Permanent Injunction be vacated, and pursuant to Rule 76(a), Utah Rules of Civil Procedure that this Court direct the trial Court to enter its Order dismissing Plaintiffs-Respondents' Complaint against the

Defendant-Appellant City, or in the alternative, that this case be remanded to the trial Court for trial on the merits.

STATEMENT OF FACTS

The Plaintiffs-Respondents are subdividers who were, at the time of filing of this action, subdividing real property located within the boundaries of the Defendant-Appellant, South Jordan City. On or about June 4, 1979, the Plaintiffs-Respondents caused a Complaint to be filed in the trial Court and, concurrently therewith, obtained a Temporary Restraining Order and Order to Show Cause requiring the Defendant-Appellant City to show cause, if any it had, why during the pendency of this action said Defendant-Appellant should not be restrained and enjoined from requiring the Plaintiffs-Respondents to enter into a written Subdivision Water Service Agreement and as a condition precedent to final plat approval under which Extension Agreement Plaintiffs-Respondents are required to pay a water connection fee for each lot in their subdivision at the time of connection of said subdivisions water system to the Defendant-Appellant City's water mains. A time for hearing on Preliminary Injunction was set and a Restraining Order and Order to Show Cause was issued by the Court, and subsequently the parties appeared before the Honorable David K. Winder on June 15, 1979, for the purpose of determining whether or not a Preliminary Injunction should be issued against the Defendant-Appellant City with respect to the First and Third Causes of Action of Plaintiffs-Respondents'

Complaint. At that hearing, the parties, by and through their respective counsel, made a number of stipulations were entered into the record (June 15, 1979 T. 4-8). The stipulations made between the parties are binding upon the parties for the entire case.

It was stipulated that the City Council of the Defendant-Appellant City is the duly constituted legislative body of said city and that City Ordinance No. 13-1-5 was lawfully enacted, effective June 15, 1978. It was further stipulated that at all times material herein said Ordinance No. 13-1-5 was in effect with the City of South Jordan and that it is the same Ordinance set forth in paragraph 3 of the Plaintiffs-Respondents' Complaint. It was further stipulated that Exhibit D-2, entered and received into evidence, is a true and accurate copy of the Subdivision Water Service Extension Agreement approved by the governing body of the City and that said Subdivision Water Extension Agreement constitutes the standard application form for water service from the City to all developers of subdivisions located within the boundaries of the City. The Defendant-Appellant City requires that the Subdivision Water Service Extension Agreement form (Exhibit D-2) must be executed by the City's duly authorized representative and by a duly authorized representative of the subdivision developer prior to final approval by the City of the final plat of that developer's subdivision.

It was further stipulated by the parties that the Defendant-Appellant City has the statutory authority to set water rates within the City and that fixing and regulating water rates is a governmental function (June 15, 1979 T.6). The standard residential water connection fee enacted by the City Council of Defendant-Appellant is Eight Hundred Dollars ($800.00) for a three-fourths (3/4) inch line and One Thousand Dollars ($1,000.00) for a one (1) inch line.

The parties further stipulated that a park improvement fee in the sum of Two Hundred Thirty Five Dollars ($235.00) per lot had previously been duly enacted and established by the City Council.

With respect to the actual time of payment of water connection fees, the Defendant-Appellant City requires the said fees to be paid in full to the City before the subdivision water system is connected to any existing City water main. This requirement is contained in the Subdivision Water Service Extension Agreement which is the application a developer must sign prior to final approval by the City of the final plat of that developer's subdivision located within the City.

After hearing the testimony given by the Plaintiffs-Respondents on June 15, 1979, Judge Winder denied Plaintiffs-Respondents Motion for a Preliminary Injunction and dissolved the Temporary Restraining Order previously issued on June 4, 1979. (R.15)

Subsequently, Defendant-Appellant filed a Motion to Dismiss and Plaintiffs-Respondents filed a Motion for Summary Judgment. (R.21 & 27-34) On August 3, 1979, a hearing was held before the Honorable Dean E. Conder, on Plaintiffs-Respondents' Motion for Summary Judgment and on the Defendant-Appellant's Motion to Dismiss Plaintiffs' Complaint. A record was made of counsels arguments and stipulations made during that hearing. During the hearing, the Plaintiffs-Respondents' counsel stipulated that the City's Ordinance 13-1-5 is constitutional (August 3, 1979 - T.3). The Plaintiffs-Respondents have repeatedly admitted that the Defendant-Appellant City has the right to collect a water connection fee, but have objected to the time of collection of the water connection fee as being unreasonable and contrary to law. (R.40)

On August 13, 1979, the trial Court entered its Memorandum Decision wherein the trial Court found that on the basis of Section 10-8-38 and Section 17-6-22 of the Utah Code Annotated (1953), as amended, the advance collection of water connection fees by the City is contrary to law and void and granted Summary Judgment for Plaintiffs-Respondents as to those fees. (R.53-55) The trial Court found no statutory prohibition insofar as collecting park improvement fees and that such fees are valid. The trial Court accordingly granted the Defendant-Appellant's Motion to Dismiss with respect to the Third, Fourth and Fifth Causes of Action of Plaintiffs-Respondents' Complaint

so far as the same applies to park improvement fees. The Memorandum Decision of the trial Court contained the following reasoning:

> The Utah law (10-8-38 U.C.A.) provides that a mandatory hook up fee can be charged for a sewer connection where the sewer is "available and within three hundred (300) feet of any property line with any building used for human occupancy and make a reasonable charge for the use thereof." (Emphasis added). Section 17-6-22 U.C.A. provides that, if a municipal corporation operates a water works system, it may combine the charges for sewage with that of water "and may be collected and the collection thereof secured in the same manner as that specified in Section 10-8-38." This Court, therefore, holds that the advance collection of a water connection fee is contrary to law and void and Summary Judgment is granted as to these fees. (R.54)

A formal Order granting Plaintiffs-Respondents' Summary Judgment on their First Cause of Action was entered by the trial Court on September 4, 1979, at which time a Permanent Injunction was also entered by the Court restraining and enjoining the Defendant-Appellant City from requiring the payment of each lot water connection fees by the Plaintiffs-Respondents as a condition for final plat approval or for the commencement of construction of any and all street utitlity improvements. (R.58) On September 14, 1979, the Defendant-Appellant filed a Motion to Alter and/or Amend Summary Judgment (R.59-60), together with a Memordandum in Support of said Motion (R.65-69) and on January 2, 1980, the trial Court, having heard oral arguments of counsel, entered its Order denying Defendant-Appellant's Motion to Alter

and/or Amend Summary Judgment. In making its Motion to Alter and/or Amend Summary Judgment, the Defendant-Appellant City sought to have the trial Court vacate or deny the Summary Judgment and proceed to trial on the merits, or in the alternative, to grant the Defendant-Appellant's Motion to Dismiss Plaintiffs' Complaint with respect to water connection fees and to dissolve the Permanent Injunction issued pursuant thereto.

ARGUMENT

POINT I

THE DEFENDANT-APPELLANT CITY ACTED WITHIN ITS AUTHORITY IN ENACTING THE ORDINANCE AND RULES ESTABLISHING AND PROVIDING FOR THE COLLECTION OF WATER CONNECTION FEES.

In Utah, municipalities are granted broad powers for the protection of the health and welfare of their residents. All statutory references hereinafter contained are to the Utah Code Annotated (1953), as amended. Among the powers given to the Defendant-Appellant as a municipality are the statutory authority to enact ordinances, rules and regulations for the management and conduct of the water system owned or controlled by the City (10-7-14), the power to fix rates to be paid for the use of water furnished by the City (10-8-22), the right to require written application for water to be signed by an owner prior to furnishing water to the owner's premises or lot according to the ordinances, rules and regulations enacted or adopted by the municipality (10-7-10). The right to construct, maintain and operate

water works (10-8-14), the right to manage and maintain a system of water works and to pass all ordinances, penal or otherwise, that shall be necessary for the full protection, maintenance, management and control thereof (10-8-71), as well as the right to protect the health and welfare of municipal residents, under a general grant of police power (10-8-84) allowing the municipality to pass ordinances and rules and make all regulations not repugnant to law, necessary to carry into effect or discharge powers and duties conferred by this chapter, as are necessary to preserve the health and promote the prosperity, good order, comfort and convenience of the City and inhabitants thereof and for the protection of property therein.

The Utah Supreme Court has recognized the broad powers of Utah municipalities in the case of Rupp v. Grantsville City, etal, No. 16270, filed March 27, 1980. In that case this Court affirmed the trial Court's dismissal of the Plaintiff's suit for declaratory and injunctive relief wherein Plaintiff's were seeking a declaration from the trial Court that certain ordinances passed by the City of Grantsville were unconstitutional and in excess of their statutory authority. The Plaintiff was also requesting injunctive relief from the mandatory aspects of the ordinance requring mandatory hook up to the sewer system of the City. Mr. Justice Maughan, writing for this Court in Rupp, stated the Grantsville ordinance in question is a valid exercise

of the municipality's recognized police power and is therefore enforceable against the Plaintiff.

In the case at bar, the parties have stipulated that the Defendant-Appellant South Jordan City's Ordinance No. 13-1-5 was lawfully enacted by the City Council of the City and that the same is constitutional (June 15, 1979 - T.4-5 & August 3, 1979 - T.3). Said Ordinance No. 13-1-5 states:

> Application for Water Connection by Subdivider
>
> Whenever a subdivider desires or requires to install a water connection and extensions for a subdivision, the subdivider shall enter into a written extension agreement which shall constitute an application for permission to make said extension and connections and an agreement specifying the terms and conditions under which the water extensions and connections shall be made and the payment that shall be required.

Pursuant to the above Ordinance, the Defendant-Appellant City also adopted a Subdivision Water Service Extension Agreement form previously received into evidence in this case as Exhibit D-2. Paragraph 10 of said Subdivision Water Service Extension Agreement form states:

> 10. Costs of Construction. The Applicant (subdivider) hereby agrees to bear the total cost of constructing all water lines required for the servicing of the subdivision or development (to include extensions from existing water mains to the subdivision, the water system within the subdivision, and service lines to each lot in the subdivision). In consideration therefor, the City shall charge the Applicant a connection fee in the amount of $_____ for each individual dwelling unit to be served within the subdivision, which sum shall be payable in full to the City before the subdivision system is connected to any existing City water mains.

It is the foregoing language of paragraph 10 of the Subdivision Water Service Extension Agreement form that Plaintiffs-Respondents claim is unreasonable and contrary to law.

In addition to the general language of 10-8-84, the City is given statutory authority under 10-7-10 to require a written application for furnishing water to the City's inhabitants prior to furnishing any water. 10-7-10 states in part:

> Water Rates - Owner of Premises Liable. No city or town which is the owner or in control of a system for furnishing water to its inhabitants shall be required to furnish water for use in any house, tenement, apartment, building, place, premises or lot, whether such water is for the use of the owner or tenant, unless the application for water shall be made in writing, signed by such owner, or his duly authorized agent, in which application such owner shall agree that he will pay for all water furnished said house, tenement, apartment, building, place, premises or lot, according to the ordinances, rules and regulations enacted or adopted by such city or town ... (Emphasis added)

In summary with respect to Point I, the Defendant-Appellant as a municipality is given broad statutory authority and powers for the protection of the health and welfare of its residents. Plaintiffs-Respondents are not challenging the right of the Defendant-Appellant City to charge a reasonable hook up fee (R.40), but are rather challenging the time of payment of that fee, i.e., the prepayment of the water connection fee at the time the subdivision system is hooked on to the City water mains.

POINT II

THE DEFENDANT-APPELLANT CITY HAS THE AUTHORITY TO DETERMINE THE TIME OF PAYMENT OF THE WATER CONNECTION FEE

It has long been recognized that a municipal corporation has the power to pass ordinances regulating and managing its water works. The general rule is set forth in 78 AmJur 2nd Waterworks, Section 69 as follows:

> It is agreed by all the authorities that when a municipal corporation engages in the business of furnishing water to its inhabitants by means of a permanent water works, it stands on the same footing, and has exactly the same right to make and enforce reasonable rules and regulations as a private corporation upon whom a franchise for that purpose has been conferred, and therefore an ordinance prescribing such regulations has the same force, and no more, of a by-law of a private corporation's powers are of like character and conferred for the same purpose. The only restriction upon the power to pass such ordinances is that they conform to the laws of the state and are reasonable.

As specified hereinabove and in the arguments made under Point I, the statutory authority in Utah provides broad powers for the municipality in establishing and collecting water connection fees. This is a right which is not disputed by the Plaintiffs-Respondents in this action.

While the municipality does have the authority and power to determine the time and method of payment, the ordinance or regulation of the municipality must be reasonable. Defendant-Appellant contends that the real issue raised by the Plaintiffs-Respondents in this case is reasonableness of the method and time of payment of the water connection fee to

78 AmJur 2d Waterworks, Section 70 states:

> Rules and regulations of a water company or municipality furnishing water must be reasonable and are not enforceable if they are unreasonable or discriminatory. The reasonableness and validity of such rules and regulations is a matter to be determined largely with reference to the facts and circumstances of the particular case, and the Courts have jurisdiction to determine whether any such rule or regulation is fair and just or unreasonable and oppressive.

To determine the reasonableness of the Defendant-Appellant's requirement of time payment of water connection fees requires that the trial Court look at all of the surrounding facts. In the case at bar, the Defendant-Appellant City has not yet had an opportunity to file an Answer to Plaintiff's Complaint. Whether or not Defendant-Appellant rules and regulations are reasonable is a question of fact which is in dispute in this action and, therefore, Summary Judgment cannot be granted.

Defendant-Appellant submits that the trial Court's Memorandum Decision based upon the provisions of 10-8-38 and 17-6-22 was in error. 10-8-38 provides for a mandatory hook up fee to be charged by the City for a sewer connection where the sewer is available and within three hundred (300) feet of any property line with any building used for human occupancy and make a reasonable charge for the use thereof. In the case at bar, the Defendant-Appellant does not own or operate a sewer system and the City does not collect any charges or fees for sewer services.

The trial Court is apparently attempting to extend this language for sewers to mean that a building must be built on a

subdivision lot and used for human occupancy before a water connection fee can be charged. This is a most strained and incorrect conclusion. 10-8-38 is not applicable under facts of this case. To the contrary, the provisions of 10-7-10 speak in terms of the City's furnishing water to a place, lot or premises, as well as to structures or buildings. (Emphasis added) The Defendant-Appellant has furnished water at the time water is flowing through the subdivisions lines and that this is the time the water connection fee should be collected by the City.

It is most inconsistent to admit that a city has the power to collect a water connection fee while denying that said city has the statutory authority to determine the time of payment of that fee. Inasmuch as the Defendant-Appellant City has the power to collect the water connection fee, the Defendant-Appellant also has the express and implied power to determine the time of payment of that fee unless the same is determined to be unreasonable by the Court. This determination could only be made upon viewing the evidence after a trial on the merits.

POINT III

THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT ON PLAINTIFFS-RESPONDENTS FIRST CAUSE OF ACTION AND ENTERING A PERMANENT INJUNCTION AGAINST THE DEFENDANT-APPELLANT CITY THEREON IS REVERSIBLE ERROR

Rule 56(c) of the Utah Rules of Civil Procedure provides that Summary Judgment shall be rendered only if the pleadings, depositions, answers to interrogatories and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

It is a well settled rule in this jurisdiction that Summary Judgment is not proper where there are genuine issues raised as to material facts. In this case, PlaintiffsRespondents allege in their Complaint and other pleadings that they received no benefit in that they will never use the water service and that the City's collection of the water connection fees constitute an unlawful of taking without due process of law. (R.39)

In an affidavit submitted in opposition to Plaintiffs' Motion for Summary Judgment (R.24-25), the City Attorney for the Defendant-Appellant alleged that each of the Plaintiffs-Respondents herein receive substantial and direct benefits from subdividing within the City of South Jordan and from connecting to the City's water system and utilizing open spaces and land within the City. The affidavit further states that the water connection fee was enacted by the legislative body of the City and constitutes a reasonable charge payable in a reasonable manner as determined by the legislative body of the City. The reasonableness of the time and method of collection of the water connection fee and of whether or not benefits are conferred upon the Plaintiffs-Respondents are questions of material fact which are very much in dispute in this case. Whether or not the City has furnished water within the meaining of 10-7-10 also raises a

genuine issue as to the material fact. The trial Court, therefore, errored in granting Summary Judgment in light of these disputed facts.

The Summary Judgment cannot be granted as well by reason of the fact that Plaintiffs-Respondents are not entitled to a judgment as a matter of law, which is more particularly set forth in the arguments raised under Points I and II, hereinabove.

POINT IV

THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT-APPELLANT'S MOTION TO DISMISS PLAINTIFFS-RESPONDENTS' COMPLAINT

The Defendant-Appellant's Ordinance 13-1-5 and Subdivision Water Service Extension Agreement form adopted by the Defendant-Appellant City's governing body establishing water connection fees and requiring the same be paid prior to the time any developer of a subdivision hooks that subdivision to the City's existing water mains is constitutionally valid as a reasonable requirement imposed for the health, safety and welfare of the citizens and inhabitants of the Defendant-Appellant City.

It is well established law that cities may impose conditions in connection with the approval of a proposed subdivision, plat or map. Ayres v. City Council for Los Angeles, 34 Cal. 2d 31, 207 P2d 1, 1949. Pursuant to the provisions of 10-7-10, no city shall be required to furnish water to any premises or lot unless application for water shall be made in writing and signed by the owner or his duly authorized agent in which such owner

agrees that he will pay for all of the water furnished to such premises or lot according to the ordinances, rules and regulations enacted or adopted by the city. No mention is made in such statute of use, or of the necessity of having a dwelling structure erected on the premises or lot and, in fact, the statute provides that the owner may be liable for a tenants water application even though said owner may never actually use the water. Passage of the foregoing city ordinance constituted a legislative act of the municipality and, as such, should be afforded a presumption of constitutionality with the burden of proving its unreasonableness being placed upon the challenger, Village Belle Terre v. Boraas, 416 U.S.1 (1974); and Dowse v. Salt Lake City Corp., 123 Utah 2d 107, 255 P.2d 723 (1953); Marshall v. Salt Lake City, 105 U 111, 141 P.2d 704 (1943).

Furthermore, even if the reasonableness of an ordinance is "fairly debatable," the Courts generally refuse to interfere with the judgment of the legislative body. Village of Enclid v. Ambler Realty Co., 272 U.S. 365 (1926); and Rural Newtown, Inc. v. Palm Beach County, 315 So. 2d 478 (Florida 1975).

The right of the municipality to require certain payments or contributions by subdividers as a condition precedent to the approval to plans and plats as based upon the premise that one should consider the health and general welfare of the inhabitants of the city and that public policy dictates that those who, for profit, seek to subdivide lands, shall in some appropriate

way assist the local government in the installation of the necessary facilities, to-wit: the water system, parks and recreation facilities and other facilities by making payments sufficient to cover a fair contribution to those facilities towards those expenses which have theretofore been met by others. Associated Home Builders of Greater East Bay, Inc. v. Walnut Creek, 94 Cal Rptr 638, 484 P.2d 606, (1971).

In Homebuilders Association of Greater Salt Lake v. Provo City, 503 P.2d 451 (1972), the Utah Supreme Court recognized the foregoing principles in upholding a sewer connection fee intended to provide the requisite funds for improvement and enlargement of the sewer system of the City of Provo, State of Utah. In the Provo City case (supra) the Plaintiff, Homebuilders, argued that the sewer connection fee was in that case in fact a revenue or taxing measure, just as the Plaintiffs are urging in their Complaint in the instant case. The Plaintiffs in the Provo City case further urged that the ordinance was unconstitutional and that it exacted funds from the homebuilders as a special class which should be borne by the entire community. In that case, the Supreme Court of the State of Utah held that the sewer connection fee was imposed in a reasonable and nondiscriminatory manner and constituted a reasonable exercise by the city of its statutory power. The Court also cited in its opinion the case Airwick Industries, Inc. v. Carlstadt Sewage Authority, 57 N.J. 107, 270 A.2d 18 (1970); in which case a New Jersy Court

concluded that the governmental entity in that case might include as part of the connection fee a sum of money which would represent a fair contribution by the connecting party toward the expense theretofore met by others. This Court also found that all properties where service was available, whether actually using the system or not, receive some benefit and an increase in value. More recently, the Utah Supreme Court has ruled on these matters in the case of Call v. City of West Jordan, No. 15908, filed December 26, 1979. In that case the Supreme Court considered allegations substantially similar to those raised in Plaintiffs-Respondents' Complaint on file herein and found that the ordinance of the City of West Jordan was valid and constitutional, that there had been no taking without just compensation nor had the City levied an invalid tax upon the developers.

This Court in the case of Rupp v. Grantsville City, etal, (supra), found that the City of Grantsville had not exceeded its statutory authority in passing certain ordinances requiring mandatory connection to a completed sewer system and further providing that Plaintiff's water service could be terminated because of their failure to pay the initial connection fee. Justice Maughan, in writing for this Court, cited the provisions of 10-8-84, which provided:

> "They (municipalities) may pass all ordinances and rules and make all regulations not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health and

promote prosperity ... comfort and convenience of the city and inhabitants thereof for the protection of property therein; ..."

By reason of all of the foregoing the Defendant-Appellant submits that the requirements of its ordinances, rules and regulations with respect to the establishment of a water connection fee, together with the method and time of payment, are valid and not violative of the provisions of statutes of the State of Utah and that the same does not constitute a taking, or unauthorized tax on the Plaintiffs-Respondents and that, in fact, the Plaintiffs-Respondents receive substantial benefits from the right to subdivide property and lands within the Defendant-Appellant City and to have the City furnish water to their subdivisions.

CONCLUSION

The foregoing analysis has shown that it was reversible error for the trial Court to enter Summary Judgment for the Plaintiffs-Respondents on the First Cause of Action of their Complaint, by reason of the fact that there exists genuine issues as to material facts and that Plaintiffs-Respondents are not entitled to judgment as a matter of law. It is not disputed that the Defendant-Appellant City has the right to charge a water connection fee. The City is, therefore, entitled to have its legislative body to determine the time of payment of that fee, provided the same is reasonable. Reasonableness is a question of

fact and must be determined by the trier of fact after consideration of all the evidence. In the instant case, the Defendant-Appellant has not yet had the opportunity to file an Answer in this case.

The Supreme Court should alter and/or amend the Judgment of the trial Court by granting Defendant-Appellant's Motion to Dismiss Plaintiffs-Respondents' Complaint or, in the alternative, should remand this case to the trial Court for trial on the merits.

Respectfully submitted,

STRINGHAM, LARSEN, MAZURAN & SABIN
A PROFESSIONAL CORPORATION
Attorneys for Defendant-Appellant
200 North Main Street, Suite 200
Salt Lake City, UT 84103
Telephone: 328-1501

Michael J. Mazuran
MICHAEL J. MAZURAN

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing Appellant's Brief to the following, first class postage thereon prepaid, this 1st day of May, 1980: John H. McDonald, 320 South 300 East, Suite 1, Salt Lake City, Utah 84111.

Michael J. Mazuran